Editor's note: Reconsideration denied by Order dated Aug. 10, 1988; Appealed -- aff'd Civ.No. 88-113 (ED Ky. Aug. 7, 1989), appeal filed, No. 90-5189 (6th Cir.), aff'd (Feb. 12, 1991), 925 F.2d 164.

CUMBERLAND RECLAMATION CO.

IBLA 85-583 Decided April 18, 1988

Appeal from a decision of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, holding that a dredging operation is a surface coal mining operation required to pay reclamation fees in accordance with the Surface Mining Control and Reclamation Act of 1977.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

   "Dredging." Dredging to recover coal from a lake or river is a surface coal mining operation as defined in the Surface Mining Control and Reclamation Act of 1977. A company in the business of dredging sand, gravel, and coal from a river is required to pay reclamation fees pursuant to the Surface Mining Control and Reclamation Act of 1977 unless otherwise exempted by the Act.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

   Until its repeal by Congress, the 2-acre rule exempted small operators who could show that their operations, together with related operations, affected less than
   2 acres. The burden of showing entitlement thereto was on the operator claiming the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

   Under 30 U.S.C. | 1291(28), the extraction of coal which is incidental to the extraction of other minerals where coal does not exceed 16-2/3 percent of the mineral tonnage removed for commercial use or sale is exempt from the requirements of the Surface Mining Control and Reclamation Act of 1977. The burden of alleging facts and establishing entitlement to this exemption is upon the person claiming it.

APPEARANCES: W. Patrick Hauser, Esq., Barbourville, Kentucky, for petitioner; David W. McNabb, Esq., Office of the Field Solicitor, United States Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By letter dated July 11, 1984, the Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement (OSMRE), notified Cumberland Reclamation Company (Cumberland) that an investigation had determined that it was involved in dredging operations in the Cumberland River and that such operations constituted surface coal mining operations under the applicable statutory provisions. Accordingly, this letter advised Cumberland of its responsibility to tender the reclamation fees mandated by section 402 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1232 (1982).

In subsequent discussions with OSMRE, Cumberland officials took the position that the dredging operation which they conducted did not come under SMCRA's ambit, and, even if their dredging operation were properly deemed to constitute a surface coal mining operation, they contended that Cumberland was not covered by the Act because the operation did not involve more than 2 acres of land.

In arguing that Cumberland's operation was not a "surface coal mining operation" within the meaning of section 701(28) of SMCRA, 30 U.S.C. | 1291(28) (1982), Cumberland sought to distinguish its mining process from the process which had been utilized by the appellant in United States v. H.G.D. & J. Mining Co., 561 F. Supp. 315 (S.D. W.Va. 1983). Cumberland argued that, unlike the operation in H.G.D. & J. Mining, its operation did not disturb the natural river bottom, whereas it was admitted that H.G.D. & J. Mining Company had cut a hole 15 feet into the bottom of the riverbed.

In light of the objections raised by Cumberland, OSMRE sought advice from the Office of the Solicitor. By memorandum dated October 15, 1984, the Office of the Solicitor advised OSMRE of its conclusion that Cumberland was subject to the reclamation fee provisions of SMCRA. In this memorandum, the Solicitor's Office noted that Cumberland did not excavate the bottom of the stream, as had H.G.D. & J. Mining Company, but deemed this "a distinction without a difference." It also rejected Cumberland's assertion that it was entitled to the 2-acre exemption provided in the Act, contending that "[i]n addition to the area of actual dredging and related surface operations, virtually the entire downstream area for a considerable distance would have to be considered 'affected.'" It was therefore concluded that the requisite reclamation fees were due and owing on all production from the facility.

By letter dated April 9, 1985, the Director of the Lexington Field Office, OSMRE, informed Cumberland of his decision that its dredging operations were subject to appropriate reclamation fees in accordance with SMCRA.

He also advised Cumberland of its right to appeal that decision in accordance with 43 CFR 4.1280. On May 2, 1985, Cumberland filed its appeal of this decision, alleging (1) that it was not properly deemed to be a surface coal mining operations; (2) that if it were deemed to be a surface mine, it was exempt by virtue of the fact that it neither disturbed more than 2 acres nor did the coal removed from its operation constitute more than 15 percent of the total minerals removed from the Cumberland River.

We are thus presented with two discrete questions. First, are Cumberland's operations properly deemed to be surface coal mining operations as those are defined in section 701(28) of SMCRA, 30 U.S.C. | 1291(28) (1982)? Second, if the answer to the first question is in the affirmative, are appellant's operations otherwise exempt from regulation under SMCRA either because they affect no more than 2 acres of land or because the coal mined constitutes less than 16-2/3 percent of the minerals removed from the Cumberland River? We will examine these questions seriatim.

In March 1985, prior to determining that Cumberland's operations were covered by SMCRA, an on-site investigation of the operations was conducted by OSMRE employees, one of whom prepared a detailed report. The results of this report were summarized by OSMRE in its opening brief:

> The operation of appellant consists of a floating barge equipped with a dredge pump. The intake into the pump is equipped with a geared cutter-head which is placed against the sedimented river bottom, grinding and agitating the coal-laden sediment lying in the riverbed. The material, thus released from the bottom, is drawn through the pump into an eight-inch pipe some 600 feet in length. The mixture of water, coal, sand, gravel, wood, and other solid wastes is delivered into a receiving hopper which shakes and separates out the constituent parts of the material taken from the river. The coal thus separated is placed in one pile, all solid waste material in another pile, and the water and sand remaining are placed in a silt control structure. The sand is filtered out and removed by dragline, to be placed at various locations both on- and off-site. The silt structure is equipped with a draft tube which outflows back into the Cumberland River.

(Brief of Appellee at 2). In its response, Cumberland emphasizes that the dredge which it uses contains no mechanical devices capable of penetrating the bottom of the Cumberland River. Thus, it reiterates its contention that its operations are distinguishable from those held to constitute surface coal mining operations in H.G.D. & J. Mining.

[1] As a general rule, any dredging operation which recovers coal from a body of water is a surface mining operation under SMCRA and, as such, requires the payment of the appropriate reclamation fees. See generally United States v. H.G.D. & J. Mining Co., supra; cf. United States v. Devil's Hole Inc., 747 F.2d 895 (3d Cir. 1984). Appellant attempts to avoid this general rule by arguing that it is not applicable where the dredging operation does not involve excavation of the natural river bottom. We do not agree.

This precise question was examined by the Board in our decision in Brentwood, Inc., 76 IBLA 73, 90 I.D. 421 (1983). As in the instant appeal, the appellant in Brentwood proposed a dredging operation to recover coal which had been deposited on the bottom of the Cumberland River and Lake Cumberland. The appellant there argued that it intended to use a "'clean process,' whereby the coal in the water would be pumped to the surface, separated from the water, and the water returned to the lake or the river, without disturbing the environment." Id. at 75, 90 I.D. at 422. Noting that there would be "no mine facilities, road, trenches, overburden or
waste storage areas," the appellant in Brentwood sought to distinguish its proposed operation from surface mining.

In rejecting this argument, the Board first noted that, as defined in section 701(28) of SMCRA, 30 U.S.C. | 1291(28) (1982), "Surface coal mining operations" is broadly defined to include, inter alia:

> (A) activities conducted on the surface of lands in connection with a surface coal mine * * *, and
>
> (B) the areas upon which such activities occur or where such activities disturb the natural land surface * * *.

The Board recognized that dredging, unlike other methods of excavation, occurs on water rather than on hard earth. But the Board noted that the district court in H.G.D. & J. Mining Co. had expressly held that the statutory phrase "surface of the lands" as used in SMCRA "clearly means the surface of the earth, including the waters thereon," analogizing dredging to placer mining as a form of surface mining. United States v. H.G.D. & J. Mining Co., supra at 323. Drawing further support for this conclusion by citing references to dredging in the legislative history of SMCRA (e.g., S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977)), the Board in Brentwood concluded that the proposed dredging operation therein was properly deemed to be a surface coal mining operation within the purview of the Act. 76 IBLA at 78, 90 I.D. at 424. Consistent with the above analysis, we must conclude that the dredging operations conducted herein are surface coal mining operations and, as such, these operations are subject to the Act unless excepted under some other provision of law.

[2] On appeal to this Board, appellant has argued that, even if it is determined that its dredging operations are surface coal mining operations within the statutory definition, it is excepted from coverage under SMCRA because its surface mining activities disturb 2 acres of land or less and also because "the coal removed from the Cumberland River by the Applicant does not constitute more than fifteen percent (15%) of the total minerals removed." We will examine these contentions.

The two exemptions to which appellant refers find their basis in two statutory provisions. The 2-acre exemption was provided for in sec-
tion 528 of SMCRA, 30 U.S.C. | 1278 (1982), which declared, inter alia, that "[t]he provisions of this chapter shall not apply to * * * (2) the

extraction of coal for commercial purposes where the surface mining oper- ation affects two acres or less * * *." The second exemption to which appellant refers is part of the definition of "surface coal mining operations" which excludes from coverage "the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16-2/3 per- centum of the tonnage of minerals removed for purposes of commercial use or sale * * *." 30 U.S.C. | 1291(28)(A) (1982). For reasons which we shall detail, we find that neither exception is applicable to the instant operation.

At the outset, it must be recalled that both exemptions involved are affirmative defenses to the assertion of jurisdiction by OSMRE. See Harry Smith Construction Co. v. OSMRE, 78 IBLA 27 (1983). In this regard, it has been repeatedly held by the Board that one asserting an affirmative defense must both allege and prove facts which establish entitlement thereto. Id. at 30. In the instant case, as we shall show, appellant has failed to allege facts which would justify a conclusion that either of the two exemptions is available.

Insofar as the 2-acre exemption is concerned, it is important to note that Congress has now repealed it. See Act of May 7, 1987, 101 Stat. 300. Section 201(c) of that Act provides that, with respect to existing operations, the repeal takes effect 6 months after enactment, i.e., November 7, 1987. The effective date of repeal was delayed for existing operations in order to allow operators who had availed themselves of this loophole to either properly permit their operations or cease mining. See H. Rep. No. 100-59, 100th Cong., 1st Sess. at 5, reprinted in 1987 U.S. Code Cong. & Admin. News at 260. Thus, as a practical matter, even if appellant were now able to establish that its operations affected no more than 2 acres, this showing would be irrelevant as to future operations. However, to the extent the decision below is concerned with collection of reclamation fees for past mining activities, it is clear that this issue is not moot.

There are three separate components which, arguably, must be examined in order to ascertain whether or not appellant's operation affects no more than 2 acres: (l) the disturbance on the riverbank, (2) the area of the riverbed in which dredging occurs, and (3) the area of downstream pollution engendered by the dredging operation. Consideration of this third component is urged by OSMRE which contends that downstream pollution is properly considered as constituting part of the "affected area" under 30 CFR 701.5.

OSMRE points out that "affected area" is defined as "any land or water surface which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations." 30 CFR 701.5. Proceeding from this basis, OSMRE argues that since the dredging operation results in downstream pollution, 1/ this is part of the area "affected" by surface mining

1/ OSMRE relies on the affidavit of Terry W. House, a civil engineer employed by OSMRE, which explained the "significant pollution" occasioned by appellant's operation: "The cutter-head, while dislodging the coal from

operations and must be included in calculating whether appellant's operation affects no more than 2 acres. We decline to rule on this question, which is of some difficulty, because, as we shall show, it is our view that when the other two components are considered, it is clear that more than 2 acres have been affected by appellant's operations.

With respect to the area of dredging, appellant argues that its permitted area "is restricted to an area within 25 feet of the bank on each side of the river and only a few hundred feet along the river itself" (Supplemental Statement at 2-3). Appellant neglects to point out that, under each of the permits which it obtained from the Army Corps of Engineers, it is permitted to mine 500 feet along the river. A review of the permits clearly shows that the river is approximately 175 feet wide, which means that, even with a restriction against dredging within 25 feet of the banks, the permitted area which can be dredged is 500 feet by 125 feet or approximately 1.45 acres.

Moreover, a close review of the record shows that this 1.45-acre figure must be doubled. The reason for this is quite simple - appellant has had two plans approved by the Corps of Engineers, similar in all respects save one: they involve different areas of the river.

Thus, the first plan (ORNOP-F 81-198), which was for the 3-year period from January 18, 1982, to January 18, 1985, called for dredging the river at River Mile 647.7. A copy of the second plan (ORNOP-F 85-11), which was tendered with appellant's responsive brief, calls for dredging at River Mile 648.4, i.e., seven-tenths of a mile upstream. This is clearly no mere typographical error as the settling pond cross sections submitted with each plan are dramatically different. Thus, in essence, appellant has been dredging, over a 6-year period, two different areas of the riverbed, each aggregating 1.45 acres. 2/ Clearly, without adding any acreage for its

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fn. 1 (continued)
the river bottom, also stirs sedimentation into the water in the form of suspended particulate matter, which is carried several miles downstream." See Affidavit of Terry W. House at 2, attached to Brief of Appellee. In an attempt to counter this, appellant has submitted the affidavit of Barry W. Bacon, president of Cumberland, contending that "the operation of the Cumberland Reclamation Company's site in question does not place any pollutants into the Cumberland River. In fact, the entire process removes foreign matter from the riverbed." Affidavit of Barry W. Bacon at 2, attached to Response Brief of Appellant. Of course, OSMRE never contended that appellant placed new pollutants in the stream, merely that its operations, by their nature, increased suspended solids downstream.

2/ Insofar as the dissenting opinion suggests that it is unclear that Cumberland operated under the two permits, we can find no basis for any other conclusion. Cumberland admits that it has been operating since 1982. On Mar. 27, 1985, counsel for Cumberland submitted "a copy of the * * * permit for the Cumberland Reclamation Company dredging site at mile 647.7 on the Cumberland River." That permit, ORNOP-F 81-198, expressly provides

riverbank operations, appellant's own documentary evidence establishes that an excess of 2 acres has been disturbed by its dredging operations. 3/

With respect to appellant's assertion that, under its lease, it is only authorized to use one-half acre of land for support facilities, OSMRE correctly points out that it is not a question of what appellant is autho- rized to use but what appellant is actually using. In fact, Terry House's estimate (see note 1, supra), which had never been directly challenged by appellant, is that 1.34 acres have been disturbed. It is difficult to give any credence to appellant's reliance on what its lease provides when the original plans which it submitted to the Corps of Engineers indicated the existence of a silt basin which was, by itself, greater than one-half acre in extent. Moreover, we find it curious that appellant never once states that it uses only one-half acre of land but instead merely relies on its lease and argues that it is only authorized to use one-half acre.

While appellant clearly pleads that it should be exempted under the 2-acre rule, it never alleges the facts on which it bases this legal con- clusion. Contrary to the view espoused by the dissent, in the absence of allegations of fact which would support the legal conclusion that appellant's operation was exempt from SMCRA because the area affected was no more than 2 acres, the mere assertion that the operation was not subject to regulation does not, ipso facto, warrant the grant of a hearing. This is particularly true where, as here, the documentary evidence submitted by a party affirmatively establishes that its operations affect more than 2 acres. We hold that not only has appellant failed to show that its

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fn. 2 (continued)
that the effective date of the permit is January 18, 1982, and the comple- tion date is Jan. 18, 1985. On appeal to this Board, counsel submitted a copy of the second permit as an attachment to its Response Brief, dated Aug. 21, 1985, noting expressly that "two (2) permits" were involved and referencing a "copy of the permit in question," which was attached as Exhibit B. That permit, ORNOP-F 85-11, is for dredging at mile 648.4 of the Cumberland River. There seems no question that Cumberland has operated under each of these permits.

3/ The applicable regulation, 30 CFR 700.11, provides that 30 CFR Chapter VII does not apply "where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." 30 CFR 700.11(b) (emphasis supplied). The regulation then provides that "surface coal mining operations shall be deemed related if they occur within twelve months of each other, are physically related, and are under common ownership or control." 30 CFR 700.11(b)(2). Since the regulation further declares that operations will be deemed to be physically related "if drainage from both operations flows into the same watershed at or before a point within 5 aerial miles of either operation," a condition which necessarily obtains in the instant case, it is clear that these two dredging sites must be treated as a single operation. See generally OSMRE v. C-Ann Coal Co., 94 IBLA 14 (1986); Mullins & Bolling Contractors, 4 IBSMA 156, 89 I.D. 475 (1982).

operations affect less than 2 acres but also that the evidence which it has submitted establishes the contrary.

[3] Insofar as the question whether the coal mined was no more than l6-2/3 percent of the "tonnage of minerals removed for purposes of commercial use or sale" is concerned, we note that appellant does not even bother to assert that coal constitutes no more than l6-2/3 percent of the mineral removed "for commercial use or sale," alternately claiming that the percentage has "yet to be determined" (Response Brief at 5), or that coal "does not constitute more than fifteen percent (l5%) of the total minerals removed" (Supplemental Statement at 3, emphasis supplied). We would point out, with reference to the latter allegation that, in order to obtain the exemption, the coal must constitute no more than l6-2/3 percent of the mineral tonnage removed for commercial use or sale. Contrary to the suggestion in the dissenting opinion, not once has appellant ever asserted that the coal constitutes no more than 16-2/3 percent of the mineral tonnage removed for commercial use or sale.

It is unquestioned that substantial amounts of sand are removed in the dredging operations. Thus, the Bacon affidavit states that "in addition to the coal removed from the river, there is a substantial amount of sand which, given certain cleaning processes, is of a good commercial qual- ity" (Bacon Affidavit at 2). This, however, is a far cry from an allega- tion that the tonnage of sand removed "for commercial use or sale" is at least 83-l/3 percent of the total mineral tonnage removed for commercial use or sale.

Moreover, in asserting that it has yet to be determined what percentage of total commercial mineral production coal constitutes, appellant raises a perplexing problem. Under its lease, it is required to pay royalty to the lessor not only on all merchantable coal but also on all merchantable sand and gravel. Surely, appellant knows how much royalty it has paid to its lessor. It should not, therefore, be a particularly difficult calculation to determine whether the tonnage of sand and gravel on which it has tendered royalties constitutes at least 83-l/3 percent of the total mineral tonnage removed for sale and use. Appellant's reticence on this point speaks volumes.

Ultimately, the question presented by this case is whether the mere assertions of legal conclusions, unsupported by a proffer of facts on the one hand and contradicted by other evidence which the moving party has tendered on the other, requires the ordering of a fact-finding hearing. We think not. Appellant, seeking to raise an affirmative defense to OSMRE's assertion of jurisdiction, bears the burden of alleging facts which, if proved, would establish its qualifications for the exemption claimed. With respect to the 2-acre exemption, the evidence affirmatively establishes that appellant was not qualified therefor. Insofar as the l6-2/3 exemption is concerned, appellant has simply failed to make any factual allegations which, if proved, would establish its entitlement thereto. Based on these showings, no hearing can be justified.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

While a hearing is ordinarily not required by the Board if the allega-

tions made by a party seeking the hearing are insufficient as a matter of law to establish a right to relief (see Heirs of Doreen Itta, 97 IBLA 261 (1987)), this is not such a case. Here it is clear, as the majority of this Board acknowledge, that Cumberland alleges entitlement to claim both the "2-acre" and the "16-2/3 percent" exemptions from regulation under the Surface Mining Control and Reclamation Act of 1977 as provided for by 30 U.S.C. || 1278(2) and 1291(28) (1982), an assertion which could, if grounded in fact, afford it relief from the payment of fees it wishes to avoid. The authority of this Board to order a hearing is discretionary. 43 CFR 4.415. We have interpreted this authority to empower us to require a hearing when the pleadings furnished to us by the parties raise significant issues that cannot be decided because the facts of the case which are known to us are too scanty to permit decisionmaking. Norman G. Lavery, 96 IBLA 294, 299 (1987).

I believe this is just such a case, despite the plausible conjecture constructed by the majority from the slender record before us. I am not persuaded that Cumberland had operated on two permits, as the majority sur-mises, without some proof that both permits were in fact used, and without a showing that the total acreage dredged by Cumberland was over 2 acres in extent. Nor has it been shown to my satisfaction that the commercial sand which Cumberland claims to have been the principal product from its oper-ation did not, as is suggested by Cumberland, comprise 85 percent of the tonnage of mineral removed for purposes of commercial use by the dredging operation. While I cannot say, on the record before us, that the majority are wrong in their conclusions, I certainly cannot say they are right to deny Cumberland both these claimed exemptions from the Act on the dubious evidence now available.

I conclude that the affidavits offered by Cumberland are sufficient to raise a question of fact whether Cumberland's operations were entitled to claim the two exemptions which the majority opinion denies to them. This is so because, accepting the truth of the Cumberland affidavits, as we must do in determining whether there is a question of fact (Donald Peters, 26 IBLA 235, 24l n.l, 83 I.D. 308, 3ll n.l (1976)), the affidavits state affirma- tively that the Cumberland operations affected less than 2 acres and that the commercial extraction of coal incidental to the extraction of other minerals does not exceed 16-2/3 percent of the mineral tonnage removed for commercial sale or use. The majority has adopted the position urged by the Office of Surface Mining Reclamation and Enforcement by questioning the truth of the affidavits and has simply denied the existence of a factual question in this case. Were we to follow this procedure in all cases coming before us upon affidavits, there would never be any hearings ordered by this Board. We would simply choose to disbelieve the affiants in order to deny further inquiry.

Although I concede that the burden to prove that there is an entitle-ment to the exemptions claimed rests with Cumberland, I am not aware of any prior Board decisions which require an appellant to offer all its proofs prior to hearing in order to obtain one. The Board could, of course, order Cumberland to make an offer of proof to more fully support its allegations. But to deny a hearing on the assumption that Cumberland has nothing to offer because there are only the statements of counsel with some attached exhibits and affidavits before us is unreasonable. I would order a hearing.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge